No._____

In the Supreme Court of the United States

OCTOBER TERM, 1964

PORT OF SEATTLE, a municipal corporation, PETITIONER

v.

GLENN A. MARTIN et al., RESPONDENTS

PORT OF SEATTLE, a municipal corporation, PETITIONER

v.

VERN AARHUS et al., RESPONDENTS

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Washington entered in the above-entitled consolidated cause.

OPINION BELOW

The Washington Supreme Court's opinion is reported at 64 Wn. 2d 324, 391 P. 2d 540 (1964). A copy is attached hereto as Appendix A.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

The Washington Supreme Court's opinion was filed on April 23, 1964. The Court denied a Petition for Rehearing by order dated August 14, 1964. The judgment sought to be reviewed then became final. A copy of the judgment is attached hereto as Appendix B.

QUESTIONS PRESENTED

1. When Congress created a "public right of freedom of transit through the navigable airspace of the United States," 49 U.S.C.A. § 1304 (Supp. 1962), did it intend thereby to preclude at least some noise damage claims by landowners; or, was the Washington Supreme Court correct in holding that flights in the navigable airspace are not immune from such claims under any circumstances:

   (a) regardless of whether the flights are below 500 feet,[1]

   (b) regardless of whether the flights are over the claimant's property;[2] and

   (c) regardless of whether the flights effectively destroy the normal usefulness of the property (and thus amount to a taking of the property without due process of law),[3] substantially impair the use and value of the property,[4] or merely depreciate the value by any demonstrable amount?[5]

2. Did the Washington Supreme Court's judgment that landowners could recover against an airport operator for any depreciation in property values caused by the noise

1. As required by *Aaron v. United States*, 311 F. 2d 798 (Ct. Cl. 1963).
2. As required by *Batten v. United States*, 306 F. 2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).
3. As required by *Griggs v. County of Allegheny*, 369 U.S. 84 (1962).
4. As required by *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P. 2d 100 (1962).
5. The sole criterion in the instant case.

of aircraft using the airport—without regard to the distance or direction of the aircraft from the property in question, and without regard to the degree of interference with the use of that property—impose an unreasonable burden on interstate and foreign commerce, where uniformity of regulation was necessary and where Congress had indicated that such a burden was not to be imposed?

STATUTES INVOLVED

U.S. Const. Art. VI, Cl. 2; 49 U.S.C. § 1112(a)(2); Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C.A. § 1304 (Supp. 1962); Air Commerce Act of 1926, Ch. 344, § 10, 44 Stat. 574; 14 C.F.R. § 60.18 (b)(6)(i); Wash. Const. Art. I, Sec. 16, Amend. 9; and Wash. R.P.P.P 42 are set out in Appendix C hereto.

STATEMENT OF CASE

This case is essentially an inverse condemnation proceeding, involving claims by 196 property owners against petitioner, a municipal corporation and owner of the Seattle-Tacoma International Airport, for the alleged taking or damaging of their properties for public use without payment of just compensation in violation of Article I, Section 16, Amendment 9 of the Washington Constitution.

Seattle-Tacoma International Airport (hereinafter referred to as "Sea-Tac") is an integral part of the National Airport Plan. (Def. Ex. 127; St. 1001) Sea-Tac was designed and built by the United States under a Development of Landing Areas—National Defense Program, on land acquired by petitioner in 1942-43 with the financial aid of three neighboring municipalities (Tr. 0145, 0160-61).[5a] The airport was first opened for commercial use on

5a. The record in this case embraces the transcript of pleadings and proceedings (Tr.), the statement of trial testimony (St.), and the trial exhibits (Ex.)

September 1, 1947 (Tr. 0028). Since then, regularly scheduled aircraft[6] have continuously used the airspace above some of respondents' properties in landing and taking off from the north-south (and principal) runway. (Tr. 0028).

At the time of original construction, the principal runway was 6,100 feet in length and the airport boundary extended southerly to South 188th Street (Tr. 0145, 0160-61). In three successive steps of development, with federal aid, the principal runway was extended northerly to a total length of 10,200 feet (Tr. 0029, 0031). Finally, in 1962 the runway was extended 1,700 feet to the south, also with federal aid (Tr. 0029). The southerly boundary of the airport, separated from the end of the runway by a runway clear zone, is now at South 200th Street—4,755 feet from the end of the old runway and 3,055 feet from the end of the new extension (which was not opened for regular use at the time of trial). (Tr. 0029, 0038, 0055-56)

The respondents own residential properties south of the airport in a rectangular area bounded by South 200th Street on the north, South 216th Street on the south, 16th Avenue South on the west, and 24th Avenue South on the east. (This area is hereinafter referred to as the "litigated area.") The litigated area is roughly bisected by the extended center-line of the principal runway.

The litigated area was a sparsely settled, wooded, rural area when Sea-Tac was constructed during World War II (St. 987-90) and only 13 of the respondents owned property in the area when the airport was opened for commercial use in 1947 (Tr. 0048-49). The volume of air traffic

6. United Air Lines, Northwest-Orient Airlines, Western Airlines, Pan-American World Airways, and Pacific Northern Airlines are some of the present principal users, engaged almost entirely in interstate and foreign air carriage of passengers, freight and mail.

at Sea-Tac increased steadily from 750 flights in the latter part of 1947 to 80,602 flights in 1958, declined slightly to 78,392 in 1959 when jet aircraft were introduced into commercial service at Sea-Tac, and then resumed its upward trend. (Tr. 0029) Despite the ever-growing air traffic overhead, the 13 respondents who lived in the litigated area when Sea-Tac was opened in 1947 were content to remain in the area, where they were subsequently joined by the remaining 183 respondents. As new houses and subdivisions arose, the assessed value of property in the litigated area increased from $15,000 in 1946 to $553,000 in 1960 (the last year for which records were available). (St. 1112-13) Twenty of the respondents purchased homes in the litigated area after jet service began at Sea-Tac in October, 1959, and 10 of those 20 bought their homes after April 1, 1960 (a date subsequently made significant by the trial court's finding that sufficient numbers of jet aircraft were then flying over the litigated area to cause "substantial damage" to all of respondents' properties). (Pl. Ex. 49, 119, 119A; St. 93, 95, 854, 855, 1161) Between June, 1960, and August, 1961, 25 new homes were built in the litigated area. (St. 1106-08) Since the advent of jet aircraft at Sea-Tac, 13 building permits have been issued to respondents for new homes and improvements. (Tr. 0107, 0110-12, 0126-27, 0134-49, 0193-200, 0205-06), including a $4,000 swimming pool which has since been constructed by one of the respondents living nearest the airport boundary. (St. 1061)

The Martin complaint (involving 46 property owners) was filed on December 7, 1960, and the Aarhus complaint (involving 150 property owners) was filed on April 14, 1961, in the Superior Court for King County where respondents reside and where petitioner's airport is located. (Tr. 0184, 0218) The two actions were subsequently consolidated for purposes of trial and appeal (Tr. 0078),

and the case proceeded to trial and final judgment on the limited issues of liability and the measure of damages, pursuant to Rule 42 of the Washington Rules of Pleading, Practice and Procedure. (Tr. 0010-11, 0089-90, 0101-06)

Respondents alleged that in violation of the constitutions of the State of Washington and the United States, petitioner, "a municipal corporation with the power of eminent domain has taken and damaged the property of plaintiffs without payment of just compensation therefor by reason of its operation of a commercial airport for jet aircraft whose routine and frequent flight at low altitudes over plaintiffs' properties have substantially interfered with their use and enjoyment thereof" and "substantially damaged the value of plaintiffs' properties." (Tr. 0115-16, 0184, 0218) The taking and damaging was alleged to have "occurred during 1960, when said commercial jet aircraft first substantially interfered with plaintiffs' use and enjoyment of their properties through flights at elevations of 500 feet or less above the ground level of plaintiffs' properties; that an additional taking or damaging occurred on the date that a substantial number of scheduled jet aircraft commenced using the new 1,700-foot southerly extension to the north-south (16-34) runway"; and that with respect to the properties of some of the respondents "such properties have been taken and/or damaged by flights over congested areas at elevations of 1,000 feet or less above ground level." (Tr. 0116) The "regular and continuous low flights of jet aircraft over plaintiffs' properties" were alleged to constitute the taking of an avigation easement by petitioner, which easement "encompasses all the airspace above the plaintiffs' properties higher than a plane tangent to the lower edge of the existing navigational beam used in approaches to the runway in question." (Tr. 0116-17)

The respondents further contended that flights of piston-driven aircraft in the same flight pattern as jet aircraft—

although admittedly frequent and continuous since September, 1947—had not "taken" or "damaged" their properties, but that even if petitioner had acquired a prescriptive easement for piston-driven aircraft by such continuous use, "such easement cannot be extended to permit flights of jet aircraft." (Tr. 0117)

Petitioner denied the foregoing contentions, specifically denying that the effect of commercial jet aircraft on the use and enjoyment of respondents' properties was substantially different from that of piston-driven aircraft admittedly flying through the same airspace since 1947, and denying that petitioner had caused any depreciation in the value of respondents' properties. (Tr. 0092-94, 0179-81, 0208-16)

The 196 respondents selected 19 of their number to testify at the trial. All 19 testified generally that they were greatly annoyed and disturbed by jet aircraft, but that they were not bothered by piston-driven aircraft. Their estimates of the frequency of bothersome flights varied considerably, with the highest estimate at 30-40 daily. (St. 443) These jet flights were shown by respondents' acoustical expert to generate noise which masked out normal conversation for an average duration of 16.7 seconds—as compared with an average duration of 7.1 seconds for piston-driven aircraft. (St. 260) The same expert also established that some respondents received as much noise from piston-driven aircraft as did other respondents from jet aircraft. (Pl. Ex. 71; St. 242, 245) Respondents' surveyor established that jet flights on take-off were in excess of 1,000 feet above the litigated area. (Pl. Ex. 61-63; St. 138, 141-43) As to landings, respondents' expert observed isolated jet flights as low as 474 feet at South 216th Street and as low as 236 feet at South 200th Street. (Pl. Ex. 61-63; St. 138, 141-43) However, his measurements confirmed that most jet aircraft landing at Sea-Tac maintained altitudes at or above the 2.75° glide slope of the instrument

landing system, as required by federal law. (See 14 C.F.R. § 60.18(b)(6)(i), in Appendix C hereto.) The height of the glide slope above the litigated area ranged from 619 feet at South 216th Street to 405 feet at South 200th Street. (Tr. 0032, 0107, 0127, 0206; Pl. Ex. 60; St. 132, 136)

In an opening statement, counsel for respondents stated that their appraisers would testify to a 30 percent *reduction* in property values. (Second Suppl. St. 27)[7] After closing their case in chief, however, respondents stipulated that property values in the litigated area had actually *increased:*

> "MR. RIDDELL: We would be willing to stipulate, and I think Mr. Cressman would join me in this, that from 1946 to 1962 property values throughout King County have increased substantially and the Assessor's records show this and that this area is no exception." (St. 1111-12)

The trial court found that all of respondents' properties had been substantially damaged by the noise of jet aircraft (Tr. 0035), apparently accepting the view of respondents' lone "appraiser" that "no one in their right mind" would buy a house in the litigated area, "as against an area outside the influence of the flying pattern" (St. 730)—notwithstanding that 20 respondents had done so since jet flights commenced, and 183 respondents had done so since

7. Respondents produced only one appraiser, Mr. Keppler, who testified with respect to all of respondents' properties: "[C]ertainly it is my opinion, that they would be damaged at least 10 per cent." (St. 729) He later retracted this statement on cross-examination, explaining that "the only time I mentioned 10 per cent was in response to counsel's inquiry of me as to what I might consider—what was the word—substantial dimunition in value," and that "I did not apply it to any of these properties." (St. 790) Although on redirect Mr. Keppler returned to his opinion that there had been "substantial damage," he admitted that his opinion rested upon "no evidence other than the increased number of flights." (St. 792) and that he had made no comparative study of property values, explaining: "I told you I have not gone into that study. I had just started to scratch the surface when counsel called me off." (St. 792)

the airport opened. (Pl. Ex. 49, 119, 119A; St. 93, 95, 854, 855, 1161) However, the trial court also found that respondents' properties had previously been damaged by piston-driven aircraft. (Tr. 0037) Consequently, the trial court entered judgment for all of the respondents, but expressly limited their damages to the additional taking (or damaging) which occurred as of April 1, 1960, when the number of jet flights had become substantial. (Tr. 0010) The judgment delineated avigation easements over the properties of certain respondents found by the court to be subjected to overflights (Tr. 0008), and established liability for a constitutional "damaging" as to the remaining respondents. (Tr. 0009-10)

On appeal to the Washington Supreme Court, petitioner argued that there was no evidence to support the trial court's finding of substantial depreciation in the value of respondents' properties and that, even if the record supported the finding of the trial court, as a matter of law respondents were not entitled to recovery from petitioner on various state and federal grounds, the latter of which are hereinafter referred to with greater specificity. Respondents cross-appealed, arguing that there was no evidence in the record to support the trial court's finding that respondents' properties had been substantially depreciated in value by piston-driven aircraft and that, therefore, the trial court erred in formulating a measure of damages which precluded the recovery of damages based upon the prior taking or damaging attributable to piston-driven aircraft.

The Washington Supreme Court simplified the case considerably by ignoring the record. In total disregard of a trial which consumed more than 7 working days and resulted in the final judgment upon which the court's appellate jurisdiction depended, the court began its opinion with the statement that "the sole question on this appeal is whether the property owners have stated a claim for re-

lief . . . ." (Appendix A, p. 4) Despite the fact that the complaints, pre-trial contentions, and evidence of respondents recognized the importance of distinguishing between those respondents who were subjected to overflights and those who were not—a distinction carefully preserved in the judgment of the trial court—the court was "unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land," explaining that "the plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the near-by flights which interfere with the use and enjoyment of their land." (Appendix A, p. 10) Notwithstanding the fact that the trial court's findings of "substantial interference" and "substantial injury" were the subject of an appeal by respondents as well as by petitioner, the court opined that those terms were "not pertinent . . . in the 'inverse condemnation' context, where the action is strongly analogous to the eminent domain proceeding." (Appendix A. p. 12) Finally, the court ignored the federal questions tendered to it, by the simple expedient of "roughly grouping" them within a "broad contention" that "the Congress of the United States has placed all navigable airspace within the public domain, with the result that no use of such airspace by the public can result in liability" (Appendix A, p. 8)—a contention which petitioner had not made.

The Washington Supreme Court simply held that any "interference with the use and enjoyment of their land, with a subsequent decline in market value" (Appendix A, p. 14) constituted a taking or damaging of respondents' property for which petitioner was liable under Article I, Section 16, Amendment 9 of the Washington Constitution.

The federal questions presented in this petition for cer-

tiorari were presented to the trial court in petitioner's motion for judgment notwithstanding the memorandum opinion of the trial court (Tr. 0080-83), written objections to the finding of fact and conclusions of law entered by the trial court (Tr. 0021, 0025-26), and motion to strike the trial court's findings and conclusions and to enter judgment in favor of petitioner. (Tr. 0013-15) The federal questions were preserved and presented to the Washington Supreme Court through petitioner's assignments of error nos. 2 (Tr. 0231, p. 45; Tr. 0072-75) and 7(a)-(f) (Tr. 0231, pp. 53-55), and through subsequent written and oral argument to the court. Petitioner again tendered these questions in a petition for rehearing. (Tr. 0233, pp. 6-17) The court ordered respondents to answer the petition for rehearing. (Tr. 0234) Respondents accordingly responded with arguments directed to each of the federal questions in the petition for rehearing, including the federal questions here presented. (Tr. 0235, pp. 3-12) The Washington Supreme Court subsequently denied the petition for rehearing and entered the final judgment of which this petition seeks review.

ARGUMENT

Importance of Questions

Since this Court decided *Griggs v. County of Allegheny*, 369 U.S. 84 (1962), major airports throughout the country have been besieged by noise damage claims.[8] A government spokesman has estimated the potential liability of

8. We are informed that the Airport Operators' Council intends to request leave to file an amicus brief in support of this petition.

military airports alone at about $7,000,000,000.[9] The damage claims in the instant case approximate $1,000,000, and petitioner anticipates considerably more claims from nearby property owners not involved in this action.

Petitioner does not question the holding in *Griggs* that anyone who has been driven from his home by dangerously low, noisy overflights is entitled to compensation. But petitioner does challenge the Washington Supreme Court's decision that an airport operator must pay everyone within earshot of the airport who claims that his property has been reduced in value.

At some point beyond and above the end of an airport runway, the public's right to freedom of air navigation is paramount to the individual's right to quietude. Definition

9. In 1962 the Judge Advocate General of the Air Force, Major General Albert Kuhfeld, gave the following testimony before a House subcommittee on commerce:

> "General KUHFELD. I might be able to throw a little light on the amount of money involved in this situation. Back in 1956 we were having, from the standpoint of the Air Force, a considerable number of claims on this Causby theory and at that time the Lands Division, Department of Justice, suggested that we should make a study, to try to get afield (*sic*) of what it would cost to get abrogation easements that would eliminate these kinds of suits.
>
> "We made a study, as I recall in 1957, and I might say we have a lot more airfields now than we had in 1956 with the SAC dispersal program, and we found then that if we were going to take abrogation easements to a distance of 6 miles from the air base, from the strip, this would cost us in the neighborhood of $7 billion, and of course, you have the problem now is it 6 miles, 7 miles, 10 miles, 15 miles, how far out do you have to go with an abrogation easement to solve the problem. So it is an expensive situation we are talking about.
>
> "Mr. POGUE. You are talking about military fields?
>
> "General KUHFELD. I'm talking about just military fields that we were concerned with at that time."

Hearing on Aircraft Noise Problems Before Subcommittees of the House Committee on Interstate and Foreign Commerce, 87th Cong., at 667-68 (Dec. 6, 1962).

of that point cannot be left to the variant views of 50 state courts. Consonant with the intent of Congress, only this Court can fashion a uniform standard for the nation. The quicker an authoritative answer can be given to this portentous problem, the better for all concerned.

Question 1—Statutory Right of Freedom of Transit in Navigable Airspace

In the Federal Aviation Act of 1958, Congress reenacted a "public right of freedom of transit through the navigable airspace of the United States", 49 U.S.C.A. § 1304 (Supp. 1962), a right originally created by Congress when it placed the airspace overlying the continental United States in the public domain, in the Air Commerce Act of 1926, ch. 344, § 10, 44 Stat. 574.

Petitioner contends that Congress thereby undertook to promote air commerce by exempting lawful flights of aircraft in the navigable airspace from noise damage claims by landowners, under any circumstances short of such severe interference as would constitute a taking of the landowner's property without due process of law. The Washington Supreme Court squarely rejects this contention, holding that "flights are not immune from private litigation, whether in the process of take-off or landing . . . or above 500 feet . . . ." (Appendix A, p 9) This holding, coupled with the Court's holdings that "no over-flight or direct physical invasion of the airspace over the land is necessary in order to maintain an action under the 'taking or damaging' provisions of the state constitution" (Appendix A, p. 11) and that the complaining landowner need not even show "a 'substantial' interference before it can amount to a 'taking' or 'taking or damaging' within the purview of the constitutional language" (Appendix A, p. 12), clearly amounts to a decision that the federally created "right" is without any force or effect whatsoever

when asserted in opposition to the property rights of a landowner under state law. Such a decision is in direct conflict with the intent of Congress and is obviously impermissible under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2.

The legislative history of the Air Commerce Act of 1926 plainly demonstrates that Congress contemplated that the Act would require landowners to suffer some disturbance from noisy aircraft without compensation. This specific problem was the subject of heated debate on the floor of the House (as revealed by excerpts from the debate included in Appendix D to this petition).

Aside from the legislative history of the Air Commerce Act of 1926, Congress stated plainly and without limitation that the "navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act." 44 Stat. 574. In *Gibbons v. Ogden*, 9 Wheat. 1 (1824) this Court had occasion to consider the intended scope of a similarly unrestricted federal license to carry on the coasting trade. In answer to the contention that the grant of a federal license in the days of sailing ships did not confer the right to carry on the coasting trade by means of modern, noisy steamships, Chief Justice Marshall wrote:

> ". . . The real and sole question seem to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.
>
> "In considering this question, the first idea which presents itself, is that the laws of Congress, for the regulation of commerce, do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and, in that vast and complex system of legislative enactment concerning it, which embraces everything that the legislature thought it necessary to notice, there is not, we believe, one

word respecting the peculiar principle by which vessels are propelled through the water . . . .

* * *

"This Act demonstrates the opinion of Congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, in entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act." *Gibbons v. Ogden*, 9 Wheat. 1, 219-21 (1824)

The law of navigable waters, as well as the law pertaining to other types of public thoroughfares, was well settled in 1926 when Congress enacted the Air Commerce Act. (See Appendix D.) The doctrine of *damnum absque injuria* was then (and is now) generally applicable to claims for damages stemming from the normal usage by the public of thoroughfares located in the public domain. See, *e.g.*, *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914)

In view of the plain language of the statute in question, the legislative history preceding the enactment of that statute, and the well-settled decisional law upon which Congress based its policy of granting immunity from private claimants to any member of the public who might choose to exercise the statutory right of freedom of transit through the navigable airspace, we think the judgment of the court below cannot stand. It would be unreasonable to suppose that Congress intended to exercise its powers under the commerce clause to the point of obliterating any rights respondents may have under the due process clause of the

Fourteenth Amendment, and we make no such contention here. We accept the full implications of the decision of this Court in *Griggs v. County of Allegheny*, 369 U.S. 84 (1962), and we think that the due process requirements of *Griggs* are properly considered as inherent limitations upon the statutory immunity which we claim. If any further limitations are to be read into the statute, however, they must be imposed by Congress or by further interpretation of the federal constitution by this Court.

Question 2—Liability for Mere Noise Imposes Unreasonable Burden on Commerce

A state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary and where Congress has indicated that commerce should not be subjected to such a burden. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

Respondents seek to hold petitioner liable for damages potentially in excess of $1,000,000. There can be no question that the burden of this liability would materially and directly affect interstate commerce. Respondents suggest that "the Port has the ability of passing along its costs of operation, including the cost of air easement acquisitions to operating airlines to a substantial degree." (St. 166-67) To the extent that petitioner can pass along the burden to the air carriers, interstate commerce is obviously affected. To the extent that petitioner cannot pass along the burden of this litigation to the air carriers, commerce will nonetheless be materially and directly affected for the reason that petitioner is itself engaged in commerce—whether petitioner be considered as an "air carrier" within the meaning of the Federal Aviation Act of 1958, *United States v. City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962), or as an integral part of our interstate and foreign air transportation system, *Boynton v. Virginia*, 364 U.S. 454 (1960).

The burden imposed upon commerce by the judgment below is unreasonable in the extreme. The decision of the Washington Supreme Court expressly rejects "a balancing of the interests of the public in general against those of the individual." (Appendix A, p. 12) It expressly rejects "the idea that the individual must bear a certain amount of inconvenience and loss of peace and quiet as the cost of living in a modern, progressing society." (Appendix A, p. 12) The decision recognizes no limitations upon the pecuniary interests of an owner of real property, in holding: "When the land of an individual is diminished in value for the public benefit, then justice, and the constitution, require that the public pay." (Appendix A, p. 13)

The comprehensive economic controls which Congress has seen fit to impose upon air commerce are perhaps without parallel in the law.[10] The necessity of unified control of all matters which might materially affect the economic vitality of our national system of air transportation is emphasized by the recent decision of this Court in *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963).[11] The great concern of Congress and of this Court that all matters having an economic impact upon air commerce be carefully considered in the context of the overall needs of air commerce is perhaps even more strikingly exemplified by the decision of this Court in *Civil*

10. See discussion of pertinent federal legislation in Mr. Justice Black's dissenting opinion in *Griggs v. County of Allegheny,* 369 U.S. 84, 91-94 (1962).

11. In *Pan American* the Court held that the Civil Aeronautics Board had exclusive (not primary) jurisdiction to decide whether an affiliation between a common carrier and an air carrier was permissible under the antitrust laws. The decision departed from earlier and subsequent decisions of this Court in regulated industry cases, in subordinating the usually paramount antitrust policies of the Justice Department to the need for unified economic regulation by the Board.

Aeronautics Board v. Delta Airlines, Inc., 367 U.S. 316 (1961).[12]

Congress intended that air commerce should not be subjected to such claims as are involved in the instant case, as the legislative history of the Air Commerce Act of 1926 clearly demonstrates. (See Appendix D.) Congress undoubtedly foresaw (and in fact subsequently made provision for)[13] the necessity of compensating private property owners where the establishment of an aerial approachway would entail the appropriation of airspace essential to the use and enjoyment of subjacent land. The law of navigable waters—to which Congress looked for guidance in dealing with the navigable airspace—was already well settled that the diversion of a navigable stream over formerly fast land created a right of action in the owner of the newly submerged land. See, *e.g.*, *United States v. Cress*, 243 U.S. 316 (1917). However, it seems equally clear that Congress did not anticipate that air commerce would be required to bear the economic burden of paying private property owners for the noisy but otherwise unobjectionable flight of

12. In *Delta Air Lines* the Court reversed the Board's decision to alter, without formal notice, a certificate of public convenience and necessity previously granted to Delta Air Lines by the Board. The decision was based upon the Board's failure to pay adequate deference to Congress' expressed concern for the economic welfare of our nation's air carriers.

13. In *Griggs* this Court recognized the authority of the federal Administrator, under 49 U.S.C. § 1112(a)(2), to pay 50% to 75% of the "allowable project costs" of a national airport, including "costs of acquiring land or interests therein or easements through or other interests in airspace. . . ." 369 U.S. at 85-86. The Administrator has reluctantly accepted this construction of his statutory authority, but has understandably declined to read "interests in airspace" as embracing noise damage claims. Unlike *Griggs*, then there is no prospect of federal participation in this case. Under these circumstances, the burden on commerce is doubly unreasonable when imposed upon the local airport operator rather than upon the federal government, which controls all aspects of air commerce—including the decision to license the jet aircraft of which respondents complain.

aircraft in the navigable airspace, for the law had always been otherwise with respect to all types of public thoroughfares. See, *e.g.*, *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). The importance of preserving the integrity of any scheme of federal regulation formulated by Congress is well illustrated by the decision of this Court in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1963).[14]

In *United States v. Causby*, 328 U.S. 256 (1946), this Court stated: "The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea." 328 U.S. at 261. If common sense revolts at the idea of countless trespass suits, what must common sense do when confronted with a decision which does not even require a preliminary showing of technical trespass, but automatically refers every property damage claim directly to a jury to determine how much —not whether—the property owner is to be compensated?

We do not deny the importance to the State of Washington of retaining sovereignty over the real property of its residents, nor do we think that a reasonable application of the eminent domain provisions of the Washington Constitution would present any conflict with the federal requirements of air commerce. The decision of this Court in *Griggs v. County of Allegheny*, 369 U.S. 84 (1962), has established a just, practical and uniform standard which state courts can and must follow in the difficult judicial task of reconciling the powers granted to Congress by the

14. In *Todd Shipyards* the Court held that the taxation by Texas of an insurance company as to transactions taking place entirely outside Texas was a denial of due process. The Court followed several prior decisions of doubtful vitality, recognizing its power to reverse those decisions but choosing not to do so because Congress had posited a scheme of legislation on the continuing validity of those decisions.

commerce clause with the rights granted to private persons by the Fourteenth Amendment. The very need for such a reconciliation has been denied by respondents and ignored by the court below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT W. GRAHAM
Counsel for Petitioner

APPENDIX A

Opinion Of The Supreme Court Of The State Of Washington

[No. 36996. En Banc. April 23, 1964.]

GLENN A. MARTIN *et al.*,
Respondents and Cross-appellants,
v. THE PORT OF SEATTLE, *Appellant.*

VERN AARHUS *et al.*, *Respondents and Cross-appellants,* v. THE PORT OF SEATTLE, *Appellant.*

Appeal from a judgment of the Superior Court for King County, Nos. 560219, 566353, Henry Clay Agnew, J., entered November 27, 1962. *Affirmed.*

Inverse condemnation actions. Defendant appeals from a judgment in favor of the plaintiff.

Bogle, Bogle & Gates, Robert W. Graham, Thomas L. Morrow, and *Richard L. Young,* for appellant.

Short, Cressman & Cable, Paul R. Cressman, William L. Hintze, Riddell, Williams, Voorhees, Ivie & Bullitt, Richard H. Riddell, and *Stephen E. DeForest,* for respondents and cross-appellants.

Cleary, Gottlieb, Steen & Hamilton, Lyman M. Tondel, Jr., and *John E. Stephen,* of counsel, amici curiae.

FINLEY, J.—This is an "inverse condemnation"[1] action brought by 196 property owners against the Port of Seattle, a municipal corporation, as owner of the Seattle-Tacoma International Airport. The respondent property owners seek

1. Inverse condemnation is the only popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power. *Thornburg v. Port of Portland* (1962), 233 Ore. 178, 376 P. (2d) 100).

damages for an alleged taking or damaging of their property for public use caused by nearby low altitude flights of jet aircraft landing and taking off from the airport. The sole question on this appeal is whether the property owners have stated a claim for relief due to such jet aircraft flights. The question of actual individual monetary damage is by stipulation reserved for later separate trial.

The property in question is located directly south of the primary north-south runway of the Seattle-Tacoma Airport, in a rectangular area roughly one mile long and one-half mile wide, bounded by South 200th Street on the north, South 216th Street on the south, 16th Avenue South on the west, and 24th Avenue South on the east. The litigated area of approximately one-half square mile has been somewhat arbitrarily defined for the purposes of suit in such a manner that it is bisected by an imaginary flight line extended south along the direction of the runway. The northernmost edge of the litigated area is approximately 9/10ths of a mile from the end of the runway, and jet aircraft in the process of landing pass over this imaginary centerline of the area at altitudes of less than 500 feet.

The plaintiffs contend, in general, that the use of appellant's airport by jet aircraft[2] has unreasonably interfered with the use and enjoyment of their properties and caused substantial depreciation in the value of those properties. While the parties have been segregated for the purpose of suit in such a manner as stresses the presence or absence of an actual physical invasion of airspace,[3] the contentions

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2. The record shows that the first regularly scheduled commercial jet flight was made on October 2, 1958, and the number of jet landings per month thereafter increased from 12 in January 1960 to 1,302 in August 1962.

3. The property owners are, for the purposes of suit, divided into three groups. The "A" group is comprised of owners subject to direct over-flights, the "B" group of owners for which it is dispute whether or not there are any overflights, and the "C" group of owners which suffer no overflights.

of the plaintiffs make it clear that the gravamen of the complaint is the noise and vibration created by the aircraft rather than physical invasion,[4] making it apparent that any differentiation on this basis would be of little practical significance.

The plaintiffs make extensive claims of interference and damage flowing from the flights in close proximity to their land, some summary of which should be made here to indicate the extent of the growing societal problem of which the present action may be only a harbinger. The plaintiffs claim that, when jet aircraft pass over or in close proximity, conversation is halted, radio and television reception is disrupted, and the sound obliterated. The jets cause vibrations in the houses and of their contents, rendering it necessary to hammer the nails back into the siding of some of the homes at about 6-month intervals, and to tighten light fixtures periodically. Sleep is disrupted, outdoor entertainment almost impossible, and the noise painful to many. The noise also causes fear, particularly in small children. It is asserted that the respondents cannot sell their homes, and that the property values are substantially reduced.

The trial court held that the plaintiffs had stated a claim for relief. The theory which forms the basis of this holding may be set out as follows. The property owners were conceptually divided into two groups, one group comprising those having land which was subjected to direct overflights by the jet aircraft, the second, those as to which no overflights were shown. Respecting the first group, the trial court held that the overflights amounted to a *taking* of an air easement without just compensation in violation of Art. I, § 16, Amendment 9, of the Washington Constitution

4. This distinction accepts the perhaps unwarranted assumption commonly found in the federal cases that sound and vibration waves cannot be considered a "physical invasion," thereby also avoiding the sterile arguments sometimes directed along those definitional lines.

and Amendment XIV of the United States Constitution. As to the second group, the trial court held that the regular low flights near by amounted to a *damaging* of the properties without payment of just compensation in violation of Art. I, § 16, Amendment 9, of the Washington Constitution. According to stipulation, judgment was entered only as to potential liability, leaving the matter of damages to proof on an individual plot-by-plot basis in subsequent proceedings.

We are substantially in agreement with the trial court. However, this court will not in this case stress any of the proposed distinctions between the "taking" and the "damaging" of a property right respecting the use and enjoyment of the land. As the Washington Constitution affords or provides a basis for compensation in either instance, subtle efforts at legal refinement to characterize and describe a particular interference can be expected to be more difficult and treacherous than convincing or utilitarian.

There seems little doubt that the noise of jet aircraft in the process of landing or taking off can amount to a taking or damaging of property for which Amendment 9 of the Washington Constitution requires that compensation be made. The term "property," as used in that provision, was defined in *Ackerman v. Port of Seattle* (1960), 55 Wn. (2d) 400, 348 P. (2d) 664, 77 A.L.R. (2d) 1344, to include the unrestricted right to use, enjoy, and dispose of the land. It was there held that the frequent flights over the land of the plaintiffs amounted to a taking for which compensation in terms of the decline in market value of the land was required. The defendant in *Ackerman* was the same entity here involved.

An identical result follows in the instant case from the clear direction of the Constitution that just compensation be made for the taking or damaging of "property," as defined in *Ackerman*. The only remaining obstacle to the

plaintiffs' recovery under this approach is the problem of proving measurable detriment to the market value of their land under the traditional rules of proof. Whether the "cause of action" for the recovery of compensation is viewed as resulting from the due process provisions of the Constitution, or as resulting from an adaptation of older ideas of eminent domain and the condemnation of private property for public use, is of little significance. When the noise and intense vibration produced by low-flying jet aircraft deprives the owner of land of an essential element in his relationship to that land, the result should be the same whether the airport operator himself brings the action to "condemn" the right to so interfere with the land, or the landowner is forced to be the moving party. It should be noted that the federal government has developed the practice of affirmatively moving to condemn so-called "air easements" in connection with the operation of their air bases. See *United States v. 15,909 Acres,* 176 F. Supp. 447 (S.D. Cal. 1958). It also appears that the right of a property owner to proceed against the federal government on a theory that the noise of jet aircraft have "taken" his right to use and enjoyment of land is well established, recognized, and accepted. *Aaron v. United States,* 311 F. (2d) 798 (Ct. Cl. 1963); *Batten v. United States,* 306 F. (2d) 580 (C.A. 10th 1962); *Jensen v. United States,* 305 F. (2d) 444 (Ct. Cl. 1962); *Davies v. United States,* 295 F. (2d) 931 (Ct. Cl. 1961); *Bacon v. United States,* 295 F. (2d) 936 (Ct. Cl. 1961). Some state courts recognize that the noise of jet aircraft, and its interference with the use of land not included in a condemnation begun by the state, are additional elements of compensable damage includable in the payments required for the land or airspace actually physically taken in the action. *Bowling Green-Warren Cy. Airport Bd. v. Long,* 364 S.W. (2d) 167 (Ky. 1962); *Johnson v. Airport Authority of the City of Omaha* (1962), 173 Neb. 801, 115 N.W. (2d) 426.

The appellants resist the conclusions that would seem to flow from the above reasoning with a series of arguments which may be roughly grouped within three broad contentions: (1) That the Congress of the United States has placed all navigable airspace within the public domain, with the result that no use of such airspace by the public can result in liability; (2) that there can be no "taking or damaging" in the constitutional sense in the absence of a direct overflight of the plaintiff's land; and (3) that recovery based upon an alleged interference with the exercise or enjoyment of property rights must be limited to those instances where a *substantial* interference is shown, as opposed to a mere "incidental" damaging. These contentions

The Congress has placed certain airspace in the public domain. Consequently, aircraft are permitted to use such airspace subject only to federal regulation of their routes and operating procedures. In the Federal Aviation Act of 1958, the "navigable airspace" of the United States was expressly extended to include any and all airspace "needed to insure safety in take-off and landing of aircraft."[5] It is the position of the appellant that such legislation creates such an unrestricted right of use as to prevent any action for trespass or for nuisance, or based on any other theory that would place a burden upon interstate commerce.[6] This approach, however, overlooks the fact that recovery for the landowner is supported upon reasoning akin to eminent domain, and the taking of private property or rights for the public benefit, and not upon any consideration of whether that taking should be classed as "wrongful" or tortious under any common-law theory. It does not follow will be considered in the above sequence.

5. 72 Stat. 737, 49 U.S.C.A. § 1301 (24) (Supp. 1961).

6. It might also be noted here that the present lawsuit seeks just compensation not from the airlines or the federal government, but from the Port of Seattle, an entity subject to state law as well as federal regulation.

from the inability of the landowner to enjoin the use of the navigable airspace, semantic difficulties aside, that he should be unable also to recover for a decline in the market value of his land which was brought about or inflicted for the public benefit.

In *Griggs v. County of Allegheny* (1962), 369 U.S. 84, 7 L. Ed. (2d) 585, 82 S. Ct. 531, the Supreme Court of the United States took specific notice of the 1958 Act:

> ". . . Following the decision in the *Causby* [328 U.S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062] case, Congress redefined 'navigable airspace' to mean 'airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.' . . . By the present regulations the 'minimum safe altitudes' within the meaning of the statute are defined, so far as relevant here, as heights of 500 feet or 1,000 feet, '[e]xcept where necessary for take-off or landing.' But as we said in the *Causby* case, the use of land presupposes the use of some of the airspace above it. . . ."

We are here in agreement with the Supreme Court, and find no merit in the argument that the privilege to use the navigable airspace automatically means freedom from liability for damage or demonstratable pecuniary loss to property owners below. Flights are not immune from private litigation, whether in the process of take-off or landing; *Matson v. United States* (1959), 171 F. Supp. 283, or above 500 feet, *Thornburg v. Port of Portland* (1962), 233 Ore. 178, 376 P. (2d) 100.

The appellants next contend that the terms "taking and damaging" of the Washington Constitution provide recovery in only those instances where a property right is taken by the passage of the aircraft directly over the land of the plaintiff. This requirement, that a landowner show a direct overflight as a condition precedent to recovery of

the damages to his land, is presently stressed by some federal courts in construing the "taking" as contemplated by the Fourteenth Amendment to the Federal Constitution. *Batten v. United States*, 306 F. (2d) 580 (C.A. 10th 1962). We are unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land. The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the near-by flights which interfere with the use and enjoyment of their land.

Both *United States v. Causby* (1946), 328 U.S. 256, and *Griggs v. Allegheny Cy.* (1962), 369 U.S. 84, allowed recovery for repeated low-level flights over private land. While a direct overflight or invasion of airspace is in fact involved in each case, it is not clear that the reasoning and approach of those cases is so limited. Realistically, it must be conceded that a major part of the damage in either case was engendered by noise and vibration, whether or not accompanied by a physical displacement of air above the property. Thus, in *Causby*, the noise which frightened the chickens to a point where that type of ranching became impossible would presumably be equally inimical to the use of the land whether it came from directly overhead or obliquely from flights through the adjoining airspace of a neighbor. Again in *Griggs*, the loss of sleep due to noise and vibration was stressed as an important factor in allowing recovery, in addition to the fears engendered by the physical passage of the aircraft above or in close proximity to the home. The reliance placed upon the high noise level by the Supreme Court in both decisions, without detectable preoccupation with its angle of incidence, strongly indicates that the holdings are not limited to those instances where the aircraft passes directly over the land.

A careful reading of the above considered cases leads this court to the conclusion that the limitations inherent in the common-law concepts of trespass and ouster of possession, while highly useful in some contexts, can rapidly become outmoded in dealing with current and evolving spaceage sonic and supersonic phenomena. It is more likely that the view of Chief Judge Murrah, dissenting in *Batten*, represents the position of the United States Supreme Court. Finding it unnecessary to adhere to a strict trespass rule, he suggests compensation whenever the interference with the use of land is of sufficient directness, peculiarity, and magnitude "that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone." We must agree that the problem of balancing the interests involved, public and private, seems much the same whether a physical trespass is or is not involved.

In addition to the above, further reason exists in Washington for refusing to adopt the overly strict interpretation of "taking" pressed by the appellant. The language of the ninth amendment of the Washington Constitution provides for just compensation of not only a "taking," but also a "damaging." The specific purpose of the addition of language beyond that of the United States Constitution is to avoid the distinctions attached to the word "taking" appropriate to a bygone era. It is unnecessary to become embroiled in the technical differences between a taking and a damaging in order to accord the broader conceptual scope intended by the additional language. See *Ackerman v. Port of Seattle, supra;* 47 Minn. L. Rev. 889 (1963).

We hold that no overflight or direct physical invasion of the airspace over the land is necessary in order to maintain an action under the "taking or damaging" provisions of the state constitution.

Lastly, the appellant directs his arguments to the showing of damage and interference with use and enjoyment which was made at the trial by the plaintiff-respondent landowners. It is argued that the interference with private property rights must be shown to be a "substantial" interference before it can amount to a "taking" or a "taking or damaging" within the purview of the constitutional language, and that any lesser showing must be considered a mere noncompensable "incidental" damaging. The terms "substantial injury" and "substantial interference" appear commonly in the decided cases, sometimes as if it were the sine qua non of recovery. The terms are not pertinent, however, in the "inverse condemnation" context, where the action is strongly analogous to the eminent domain proceeding. It differs from eminent domain only in that the landowner institutes the action, rather than the entity possessing the condemnation power. Also, the plaintiff landowner in the inverse condemnation setting is usually claiming a partial taking or damaging rather than a total loss of the land itself.

When this action is analyzed in this manner, the term "substantial" is of dubious relevancy or utility. It connotes a balancing of the interests of the public in general against those of the individual. Inherent is the idea that the individual must bear a certain amount of inconvenience and loss of peace and quiet as the cost of living in a modern, progressing society. In eminent domain, and in inverse condemnation, such a balancing does not have to be accomplished as a distinct process, simply because the individual seeks no recovery for his individual suffering, damage, loss of quiet, or other disturbance. These elements of damage are cognizable in a tort action, and such a balancing would thus be necessary. But in inverse condemnation the measure of recovery is injury to market value, and that alone.[7]

7. *Ackerman v. Port of Seattle* (1960), 55 Wn. (2d) 400, 348 P. (2d) 664.

Therefore, the balance of interest inherently struck in this type of action comes about in the following manner. If the individual is unusually sensitive, and sustains a greater injury than might be suffered by the general public from such interference, the public interest in maintaining the flights leaves him to one remedy—to sell his property and move. This is no different than it would be had his land been condemned for forced sale to the state. But whichever way the state exacts such a "sale," it must pay the individual the amount he suffers in the diminishment of the value of his land, as reflected by the decrease in the amount he can receive in a sale to a willing buyer. Such lowering of market value reflects not the personal injury to the individual, but the lesser desirability of the land to the general public; *i.e.*, to a ready, able, and willing buyer. When the land of an individual is diminished in value for the public benefit, then justice, and the constitution, require that the public pay.

In the above manner, the interests which would otherwise be protected by the requirement of a "substantial" injury are vindicated in two distinct ways. First, where there is only an injury of the extent such that it should be called or labeled "incidental," no measurable or provable decline in market value could be expected traceable to the flights. Recovery would not be forthcoming, but not because of some arbitrary rule set for convenience in administration of justice, but because of an inability to prove damages according to the common and well understood rules of suit. Second, and even more significant to the balancing problem, the smaller the provable decline in market value, the slighter the burden cast upon the public in paying for it. Surely the protection of the public interest does not entail the refusal of *small* claims on the ground that the burden to the public is not great enough to pay for!

Upon the reasoning hereinbefore set out, we therefore

hold that the plaintiffs, in pleading the interference with the use and enjoyment of their land, with a subsequent decline in market value, have stated a claim upon which relief can be granted. The judgment should be affirmed in conformity with the conclusions reached herein. It is so ordered.

ALL CONCUR.

APPENDIX B

Judgment Of The Supreme Court Of The State Of Washington

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GLENN A. MARTIN and CLARESTA L. MARTIN, his wife, et al,
Respondents,

v.

THE PORT OF SEATTLE, a municipal corporation,
Appellant.

VERN AARHUS, et al,
Respondents,

v.

THE PORT OF SEATTLE, a municipal corporation,
Appellant.

REMITTITUR
No. 36996

King County
No. s. 560 219
566 352

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 23, 1964, became the final judgment of this court in the above entitled case on August 14, 1964. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 5 on Appeal, costs are taxed as follows:

Seven hundred thirty-four and 66/100 ($734.66) Dol-

lars in favor of respondents and against appellant and its surety Fireman's Fund Insurance Company.

The Petition for Rehearing was Denied by Order dated August 14, 1964.

cc: Court Reporter

SHORT, CRESSMAN & CABLE
MR. PAUL R. CRESSMAN
MR. WM. L. HINTZE

RIDDELL, WILLIAMS, VOORHEES
MR. R. H. RIDDELL
MR. S. E. DEFOREST

BOGLE, BOGLE & GATES
MR. ROBERT W. GRAHAM
MR. THOMAS L. MORROW
MR. RICHARD L. YOUNG

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of August, A.D. 1964.

WILLIAM M. LOWRY

Clerk of the Supreme Court, State of Washington.

APPENDIX C

Statutes Involved

U.S. CONST. ART. VI, Cl. 2

"Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding."

49 U.S.C. § 1112(a)(2)

"(a) Except as provided in section 1113 of this title, the United States shall not pay, or be obligated to pay, from amounts appropriated to carry out the provisions of this chapter, any portion of a project cost incurred in carrying out a project unless the Administrator has first determined that such cost is allowable. A project cost shall be allowable if—

* * *

"(2) it was incurred subsequent to the execution of the grant agreement with respect to the project, and in connection with airport development accomplished under such project after the execution of such grant agreement: *Provided, however,* That the allowable cost of a project may include any necessary costs of formulating the project (* * * including costs of acquiring land or interests therein or easements through or other interests in air space * * *) which were incurred subsequent to the enactment of this chapter; * * *)

FEDERAL AVIATION ACT OF 1958,

72 STAT. 737, 49 U.S.C.A. § 1304 (Supp. 1962)

"There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

AIR COMMERCE ACT OF 1926,

CH. 344, § 10, 44 STAT. 574

"As used in this Act, the term 'navigable airspace' means airspace above the minimum safe altitude of flight prescribed by the Secretary of Commerce under Section 3, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act."

14 C.F.R. § 60.18 (b)(6)(i)

"(6) *Final approach.* (i) When approaching to land on a runway served by a functioning instrument landing system (ILS), large fixed-wing aircraft equipped with a functioning ILS instrumentation shall be flown so as to remain at or above the glide slope between the outer marker and the middle marker: *Provided,* That when the VFR distance-from-cloud criteria require interception of the glide slope between the outer marker and the middle marker, large fixed-wing aircraft shall be flown so as to remain at or above the glide slope altitude between the point of interception and the middle marker."

WASH. CONST. ART. I, SEC. 16, AMEND. 9

"Sec. 16. Eminent Domain—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.

No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided*, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. (L. 1919, p. 385, Sec. 1.) AMENDMENT 9. Approved November, 1920."

WASH. R.P.P.P. 42

"RULE 42 Consolidation; separate trials. (a) *Separate Trials*. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

(b) *Judgment Upon Multiple Claims*. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or

other form of decision, however designated, which adjudicates less than all the claims, shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

(c) *Stay of Judgment Upon Multiple Claims.* When a court has ordered a final judgment on some but not all the claims presented in the action under the conditions stated in section (b) of this rule, the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. [Adopted Dec. 11, 1958, Sept. 9, 1959, effective Jan. 1, 1960.]

APPENDIX D

Legislative History Of Air Commerce Act Of 1926

In the floor debate in the House of Representatives, the question of the effect of the new federal law upon the interests of private property owners was the subject of extensive and decidely heated argument. The following excerpt is only a representative portion of what transpired on the floor of the House:

> "MR. HUDDLESTON. . . . I want to come back to a point which is an interesting feature in this bill. At one fell swoop the Federal Government takes exclusive jurisdiction of all of the air over the soil of the United States.
>
> * * *
>
> "Of course, I know that owners of private property have no rights that the aviators are required to respect. The doctrine when I studied the law books was that if you owned the land, it was yours down to the center of the earth and up to the top of the heavens, and you had the right to go anywhere in your property that might suit you without asking anybody's leave. But Mr. Hoover proposes to reverse that rule. He proposes to say that hereafter landowners must 'keep their feet on the ground'. No longer are you permitted to ascend into the heavens, if you have the means of doing so. You must get his permission, and the vehicle in which you ascend must meet his approval.
>
> * * *
>
> "MR. MERRITT. Does the gentleman hold, in view of this new invention of aviation—which would have been new to our fathers at least—that if he has a ranch in Texas, he could forbid anyone from flying over his ranch?
>
> MR. HUDDLESTON. I hold that under this Bill I could not do it.

"MR. MERRIT. Do you think you should?

"MR. HUDDLESTON. Probably we should do like it is said the Mexicans do and confiscate the minerals as well as the air.

"MR. MERRIT. The gentleman does not answer my question.

"MR. HUDDLESTON. No; the trouble is that I gave the gentleman an answer he did not want. That is the trouble with him. The gentleman does not like to talk about confiscating minerals, but he is perfectly willing to confiscate air. To the man who has no minerals in his land, the air above it is more valuable than the minerals under it. . . . *A flyer can sail at will over my home, and I could not prevent it under the terms of this bill. He can sail around and around with his rattling and roaring. He can disturb my privacy and put me in danger of his falling down upon me, and I have not a word to say. Although I have title to the land from the Government . . . and though I paid for it, not only have I lost the right to fly over my own land, but somebody else has succeeded to that right. It has been taken from me and donated to the public.*

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"MR. MERRIT. I insist the gentleman has not answered my question.

"MR. HUDDLESTON. I think I have. I am opposed to confiscation. If the public needs the air over my land, let the right of eminent domain be exercised; let the easement be condemned and pay me for it.

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"MR. LEA of California, in support of the bill) . . . The air may be compared with water as a means of transportation. The vessels of the United States and the vessels of private citizens have the right to navigate the water, although a private individual owns the land underneath the water. So the airplanes of the United States have the right, we believe, to navigate the air

> although underneath them is land owned by some private individual.
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> "In other words, suppose we concede private exclusive ownership from the center of the earth to the highest sky. Then, possibly, no airplane would have the right to cross any man's land without condemning such right to cross. This would be equivalent to saying that we shall have no aviation in the United States. If every individual can prohibit any plane from crossing over his land, the handicap to aviation would be insuperable.
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> "MR. RAMSEYER. Does the gentleman concede that the man who owns the lands owns the air to heaven?
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> "MR. LEA of California. He does. *But it is subject to the right of transportation, as is the water over his land. . . .*" (Italics supplied.) 67 Cong. Rec. 7318-19, 7320 (1926).

The reference in the House debate to legal precedent in the law of navigable waters was not a chance remark. The same analogy was drawn in the conference report on S. 41, the bill which was enacted into law as the Air Commerce Act of 1926:

> "One of the most serious obstacles to the progress of commercial aviation has been our national tendency to think along the lines of railroad and motor transport. It has even been suggested that commercial aviation be placed under the same branch of the Government as that which controls our railroads. As a matter of fact, the problems of the commercial use of the navigable air are so similar to those of the commercial use of our navigable waters that it appears to be quite evident that the Department of Commerce, which furnishes most of the aids to ocean navigation, is the one best qualified to furnish similar aid to air navigation." Senate Report No. 2, 69th Cong., 1st Sess., 5 (1925)